FEB 14 2011

No. 10-794

In the Supreme Court of the United States

CAROLYN C. BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States is authorized by the Internal Revenue Code, 26 U.S.C. 7403, to foreclose the federal tax lien on property of a delinquent taxpayer, including property that the delinquent taxpayer co-owns with his non-liable spouse as tenants by the entirety. After a foreclosure sale, however, the non-liable spouse must be fairly compensated for her ownership interest in the property. In this case, the district court ordered a judicial sale of property that was co-owned by a delinquent taxpayer and by petitioner, his non-liable wife, as tenants by the entirety. The court awarded one half of the net proceeds from the sale to the United States to satisfy the taxpayer's unpaid taxes, and it awarded the other half to petitioner. The court of appeals affirmed. The question presented is as follows:

Whether the award of one half of the net sale proceeds fairly compensated petitioner for her interest in the property that she co-owned with her husband.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Argument 4
Conclusion 14
Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Basher, In re, 291 B.R. 357 (Bankr. E.D. Pa. 2003) 11
Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984) 8
Gallivan, In re, 312 B.R. 662 (Bankr. W.D. Mo. 2004) ... 11
Harris v. *United States*, 764 F.2d 1126 (5th Cir. 1985) .. 12
Murray, In re, 318 B.R. 211 (Bankr. M.D. Fla. 2004) 11
Pletz, In re, 221 F.3d 1114 (9th Cir. 2000) 11, 12
Popky v. *United States*, 419 F.3d 242 (3d Cir. 2005) 3, 7, 8
Spears, In re, 308 B.R. 793 (Bankr. W.D. Mich.), rev'd on other grounds, 313 B.R. 212 (Bankr. W.D. Mich. 2004) 11
Tkachik v. *Mandeville*, 764 N.W.2d 318 (Mich. App. 2009) 6
United States v. *Baran*, 996 F.2d 25 (2d Cir. 1993) 13
United States v. *Barczyk*, 697 F. Supp. 2d 789 (E.D. Mich. 2010), appeal pending, No. 10-1498 (6th Cir. Apr. 14, 2010) 9, 10, 11
United States v. *Craft*, 535 U.S. 274 (2002) 5, 6, 10

Cases—Continued: Page

United States v. *Gibbons*, 71 F.3d 1496 (10th Cir. 1995) 12, 13
United States v. *Molina*, 764 F.2d 1132 (5th Cir. 1985) 12
United States v. *Rodgers*, 461 U.S. 677 (1983) 3, 4, 5, 10
United States v. *Ryan*, No. 04-0531-CV-W-GAF, 2005 WL 6153137 (W.D. Mo. July 19, 2005) 11
United States v. *Tolbert*, Civil No. 06-5146, 2007 WL 2710432 (W.D. Ark. Sept. 13, 2007), aff'd, 326 Fed. Appx. 412 (8th Cir. 2009) 11

Constitution and statutes:

U.S. Const. Amend. V (Just Compensation Clause) 2, 8
Internal Revenue Code (26 U.S.C.):
Section 6321 4
Section 7403 2
Section 7403(a) 5
Section 7403(c) 5

Miscellaneous:

I.R.S. Notice 2003-60, 2003-2 C.B. 643 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 617 F.3d 370. The opinion of the district court (Pet. App. 24a-32a) is unreported but is available at 2008 WL 4104507.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. A petition for rehearing was denied on September 14, 2010 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on December 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. The United States brought this suit in the district court pursuant to 26 U.S.C. 7403 to reduce to judgment the delinquent federal tax liabilities of Charles J. Barr (taxpayer); to foreclose the federal tax lien on real property in Michigan that taxpayer and petitioner (taxpayer's non-liable wife) owned as tenants by the entirety; and to have the property sold at a judicial sale to pay the delinquent taxes from taxpayer's share of the net sale proceeds. Pet. App. 3a. The United States obtained a default judgment against taxpayer in the amount of the delinquent taxes, $324,438.88, plus interest from March 21, 2008. *Id.* at 25a. The United States then filed a motion for summary judgment on its remaining foreclosure and sale claims, which petitioner opposed. *Id.* at 3a-4a.

The district court granted summary judgment for the United States, holding that the government was entitled to foreclosure and sale of the property. The court ordered a judicial sale. See 5:07-cv-11717 Docket entry No. 41 (E.D. Mich. June 18, 2009). The court further ordered that one half of the net proceeds (after payment of sale expenses and undisputed superior claims) would be paid to the United States to satisfy its judgment for taxpayer's delinquent taxes, and that the other half would be paid to petitioner to compensate her for her interest in the property. Pet. App. 4a, 24a-32a.

2. The court of appeals affirmed. Pet. App. 1a-23a. On appeal, petitioner contended that a 50-50 division of the net sale proceeds violated her rights under the Just Compensation Clause because a one-half share was inadequate to compensate her for her interest in the entireties property. *Id.* at 4a-10a. Although petitioner and taxpayer are approximately the same age (born on

June 15, 1940, and September 17, 1940, respectively), petitioner relied on life expectancy tables issued by the Social Security Administration showing that she could be expected to outlive taxpayer by 2½ years. Docket entry No. 27, Exhs. B, ¶ 9; D; F; H, ¶ 1 (June 13, 2008). Petitioner claimed that her longer life expectancy gave her a survivorship interest in the property that was greater than taxpayer's, and that she should therefore be awarded the "vast majority of the sale proceeds." Pet. App. 3a. See Pet. C.A. Br. 36 (valuing petitioner's alleged interest at more than 93%).

The court of appeals rejected petitioner's argument. Pet. App. 3a-10a. The court observed that "[i]n determining property interests for federal tax law purposes, 'the definition of underlying property interests is left to state law,'" *id.* at 4a (quoting *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983)), and that "spouses are entitled to equal interests in entireties property in every situation contemplated by Michigan law," *id.* at 5a. The court explained in particular that, under Michigan law, "[i]f property held by the entirety is sold, each spouse is entitled to half of the proceeds, and upon divorce, state law provides for a default equal division of such property." *Ibid.* The court observed that if the spouse with a longer life expectancy had a larger interest in entireties property under Michigan law, that greater interest would be reflected in the division of property upon divorce or a consensual sale. *Id.* at 7a. But because Michigan law provides for the equal division of property in those situations, the court explained, "differences in life expectancy do not result in different survivorship interests." *Ibid.* The court also noted that "[t]he Third Circuit has reached the same conclusion in" *Popky* v. *United States*, 419 F.3d 242, 245 (2005), where, after

noting that Pennsylvania's entireties law was analogous to Michigan's, the court held that each spouse had an equal share in a tenancy by the entirety and thus an equal interest in the proceeds of a sale of tax-encumbered property. Pet. App. 5a-6a.

Chief Judge Batchelder dissented. Pet. App. 14a-21a. She "disagree[d] with the majority opinion's conclusion that a [26 U.S.C.] § 7403 forced sale is equivalent to a divorce or consensual sale." *Id.* at 18a. Judge Batchelder would have held that, after the compelled judicial sale that took place in this case, an award of half of the net sale proceeds did not adequately compensate petitioner for her survivorship interest. *Id.* at 19a-21a.[1]

ARGUMENT

Petitioner contends (Pet. 17-30) that an equal division of the net proceeds from the foreclosure sale of property co-owned by petitioner and taxpayer as tenants by the entirety does not adequately compensate petitioner for her interest in the property. The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. It is undisputed in this Court that a federal tax lien attached to taxpayer's interest in the property at issue, that the United States was entitled to foreclosure and sale of the property, and that petitioner was entitled to fair compensation from the sale proceeds for her interest. Under 26 U.S.C. 6321, the United States has a

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[1] The court of appeals unanimously rejected (Pet. App. 11a-16a) petitioner's argument that foreclosure should have been denied altogether pursuant to the district court's limited discretion to do so under *Rodgers*, 461 U.S. at 710-711. Petitioner does not seek review of that aspect of the court's decision.

lien on "all property and rights to property" of a taxpayer who neglects or refuses to pay his taxes after demand. In *United States* v. *Craft*, 535 U.S. 274 (2002), this Court held that the federal tax lien attaches to property in Michigan held by the entirety even if only one of the co-owning spouses is liable for the tax that gave rise to the lien. The Court reviewed the "bundle of sticks" that Michigan law conferred upon each tenant by the entirety, and it concluded as a matter of federal law that the "bundle" constituted property to which the federal tax lien attached. *Id.* at 278, 283-285. Based on the substantial rights of a Michigan tenant by the entirety and the broad language of the federal tax lien statute, this Court held that such a tenant "possesses individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purposes of the [tax] lien." *Id.* at 276.

Under 26 U.S.C. 7403(a), the United States is authorized to file a civil action in federal district court to enforce the federal tax lien upon property to which the lien has attached. In such an action, the district court is empowered to determine the merits of all claims to and liens upon the property, and to decree a sale of the property to satisfy an established claim of the United States. 26 U.S.C. 7403(c). In *United States* v. *Rodgers*, 461 U.S. 677, 690-702 (1983), the Court held that Section 7403 authorized the United States to seek foreclosure and sale of homestead property in Texas to enforce a lien for taxes owed by only one of the spouses, provided the nonliable spouse was fairly compensated from the sale proceeds for her interest in the property.

2. Although petitioner does not question the propriety of the forced judicial sale in this case, she contends that she is entitled to more than one half of the net sale

proceeds. Petitioner argues (Pet. 17-30) that because she has a longer life expectancy than her husband, the value of her survivorship interest in the property is greater than taxpayer's, and the division of the sale proceeds should reflect that greater value. The court of appeals' contrary decision is consistent with this Court's precedents, however, and with the only other appellate decision that has addressed this issue.

In *Craft*, this Court "express[ed] no view as to the proper valuation of respondent's husband's interest in the entireties property." 535 U.S. at 289. In the course of its opinion, however, this Court noted that "[r]espondent had no more interest in the property than her husband." *Id.* at 285. Indeed, as this Court explained, under Michigan law both cotenants in a tenancy by the entirety have precisely the same rights: the right to use the entire property; the right to exclude third parties from using it; the right to an equal share of the income produced from it; the right of survivorship; the right to become a tenant in common with equal shares upon divorce; the right to sell the property with the cotenant's consent and to receive one half of the proceeds upon such a sale; the right to place an encumbrance on the property with the cotenant's consent; and the right to block the cotenant from selling or encumbering the property unilaterally. *Id.* at 282; see Pet. App. 5a (noting that "spouses are entitled to equal interests in entireties property in every situation contemplated by Michigan law"); see also *Tkachik* v. *Mandeville*, 764 N.W.2d 318, 322-323 (Mich. App. 2009), rev'd on other grounds, 790 N.W.2d 260 (Mich. 2010), and cases cited therein.

After this Court's decision in *Craft*, the IRS issued a notice stating that "[a]s a general rule, the value of the

taxpayer's interest in entireties property will be deemed to be one-half." I.R.S. Notice 2003-60, 2003-2 C.B. 643. The Third Circuit also held that the value of a delinquent taxpayer's interest in a tenancy by the entirety is one half of the property's value. *Popky* v. *United States*, 419 F.3d 242, 245 (2005).

In *Popky*, the taxpayer and her husband sold property that they owned by the entirety under Pennsylvania law. After the sale, the title insurance company paid approximately $43,000 of the sale proceeds to the IRS to satisfy a federal tax lien that had been filed against the wife. 419 F.3d at 243. The Popkys filed a quiet title action to recover the amount paid to the IRS, contending that the federal tax lien did not attach to the wife's interest in property that she and her husband owned as tenants by the entirety. *Ibid.* After noting that "Pennsylvania's law of tenancy by the entiret[y] is materially similar to Michigan's," the Third Circuit relied on *Craft* in affirming the district court's decision that the federal tax lien attached to the wife's interest in the property. *Id.* at 244.

The Popkys also argued that the district court had erred in valuing the wife's interest at 50% of the property, and that the valuation should be based instead on the spouses' respective life expectancies. The Third Circuit rejected that contention. *Popky*, 419 F.3d at 244-245. The court held that "[v]aluing the interests of tenants by the entiret[y] equally accords with the long-standing Pennsylvania common law definition of tenancies by the entirety." *Id.* at 245. The Third Circuit also noted that a 50-50 division of the proceeds from a foreclosure sale is similar to the distribution of entireties property that occurs when the tenancy is severed by

reason of a consensual sale or a divorce.[2] *Ibid.* Finally, the Third Circuit stated that its result was supported by "sound policy" because an equal division of proceeds is "far simpler and less speculative" than the Popkys' proposed method. *Ibid.*

3. Petitioner contends (Pet. 17-30) that an equal division of the sale proceeds unfairly fails to acknowledge her greater survivorship interest in the entireties property, and that the court should have relied on actuarial life expectancy tables to determine the extent of her greater interest. Petitioner states (Pet. 18) that, by adopting an equal-division rule, the Third and Sixth Circuits have substituted judicial expediency for accuracy and just compensation. Petitioner fails to recognize, however, that reliance on actuarial tables is likewise nothing more than an "expedient" way to determine the value of two cotenants' interests, particularly in cases like this one, where the two spouses are the same age and their life expectancies differ by only 2½ years.

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[2] Like the Third Circuit, the court of appeals in this case reasoned that, because Michigan law mandates a 50-50 division of proceeds after a consensual sale of entireties property, the same division is appropriate in the forced-sale context presented here. See p. 3, *supra*. The dissenting judge would have held that a consensual sale and a forced sale should not be treated similarly because cotenants who consent to sale voluntarily "surrender[] their survivor interests." Pet. App. 21a. See also Pet. 21. As the court of appeals explained, however, the amount of compensation the government is required to pay after a taking of property does not turn on the willingness of the property owner to part with her interest. See Pet. App. 9a (explaining that, to satisfy Just Compensation Clause requirements, an "owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time of the taking") (quoting *Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984)).

As the district court recently recognized in *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 799 (E.D. Mich. 2010), appeal pending, No. 10-1498 (6th Cir. Apr. 14, 2010), actuarial tables are intended to estimate life expectancy among groups of individuals. They are of limited value when applied to a particular individual. For example, "[t]he fact that men have a shorter life expectancy tells us very little about the chance of a particular husband predeceasing his wife, or vice-versa." *Ibid.* Resort to actuarial tables would plainly be unreliable if the cotenant with the longer life expectancy has been diagnosed with a terminal illness while the other cotenant is in good health, or if family history suggests that a particular individual has a longer or shorter life expectancy than the average person of his sex and age.

Moreover, the actuarial tables upon which petitioner relies do not take into account contingencies that would affect the value of her survivorship interest. Upon retirement, married couples often sell their homes in order to "downsize" their living quarters or to move to retirement communities. Married couples also frequently divorce. Either of these events—a consensual sale or a divorce—would result under Michigan law in an equal division of the sale proceeds or property. Because actuarial tables do not account for those common occurrences, they overstate the value of the survivorship interest of the spouse with the longer life expectancy.

Given the uncertainties inherent in relying on actuarial tables when attempting to value the survivorship interests of a particular husband and wife, it was not unreasonable for the Sixth Circuit here (and for the Third Circuit in *Popky*) to adopt a 50-50 division, at least in cases where the two cotenants are close in age. Perhaps recognizing the difficulty in placing a value on the sepa-

rate interests of cotenants of jointly owned property, this Court has declined to address the issue in its prior decisions. In *Rodgers*, this Court in dictum, and "*only for the sake of illustration*," gave as an example the valuation of a spouse's interest in homestead property (not entireties property) under Texas law by reference to actuarial tables. 461 U.S. at 698-699.[3] And in *Craft*, the Court expressly declined to address how the proper valuation of the taxpayer's interest in the entireties property was to be made. 535 U.S. at 289; see p. 6, *supra*. Since *Craft*, only two courts of appeals have decided the issue, and both have held that a 50-50 division was appropriate on the facts of the cases before them.

4. Petitioner describes a hypothetical scenario (Pet. 24-26) in which the husband is 89 years old and the wife 26, and she suggests that, if the husband was the sole delinquent taxpayer, a 50-50 division could not adequately compensate the wife for her interest in their entireties property. Contrary to petitioner's suggestion (Pet. 10), however, the court of appeals' decision in this case does not require that a 50-50 division be made in "every situation where a court is asked to order a sale of entireties property under [Section] 7403." Rather, the court simply concluded that petitioner had "present[ed] no compelling reason why this court should not apply the *presumption* of equal spousal life expectancy implicit in Michigan law." Pet. App. 8a (emphasis added). In *Barcyzk*, the district court noted that an equal division of proceeds upon divorce is simply the default rule under Michigan law, and that if the equities of a given case favor a different result, Michigan law permits the

[3] In its example in *Rodgers*, the Court hypothesized a non liable spouse who, unlike petitioner, had the sole present possessory interest in the property, together with one half of the survivorship interest.

courts to make such a division as is just and equitable. 697 F. Supp. 2d at 800. The court of appeals' decision thus does not foreclose the possibility that a different division of sale proceeds might be appropriate if the evidence suggested an extreme disparity between the respective life expectancies of the liable and non-liable cotenants.

5. Since this Court's decision in *Craft*, the only courts of appeals that have addressed the question presented here are the Third Circuit in *Popky* and the Sixth Circuit in this case.[4] Petitioner contends (Pet. 13), however, that the ruling below conflicts with pre-*Craft* decisions from four other circuits. Petitioner's reliance on those decisions is misplaced.

In re Pletz, 221 F.3d 1114 (9th Cir. 2000), involved the valuation, for bankruptcy purposes, of a taxpayer-debtor's interest in property owned by the entirety under Oregon law. The bankruptcy court relied on joint-life expectancy tables and valued the debtor's interest at

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[4] Since *Craft*, most district courts and bankruptcy courts have adopted a 50-50 valuation approach in resolving the question presented here. See *Barczyk*, 697 F. Supp. 2d at 797-800; *United States* v. *Tolbert*, Civil No. 06-5146, 2007 WL 2710432, at *5 (W.D. Ark. Sept. 13, 2007), aff'd, 326 Fed. Appx. 412 (8th Cir. 2009); *United States* v. *Ryan*, No. 04-0531-CV-W-GAF, 2005 WL 6153137, at *2-3 (W.D. Mo. July 19, 2005); *In re Gallivan*, 312 B.R. 662, 664-665 (Bankr. W.D. Mo. 2004); *In re Spears*, 308 B.R. 793, 821 (Bankr. W.D. Mich. 2004), rev'd on other grounds, 313 B.R. 212 (W.D. Mich. 2004). On two occasions, bankruptcy courts have followed a joint-life expectancy approach to the valuation of the spouses' respective interests. See *In re Murray*, 318 B.R. 211, 214 (Bankr. M.D. Fla. 2004); *In re Basher*, 291 B.R. 357, 364 (Bankr. E.D. Pa. 2003). *In re Basher*, however, involved Pennsylvania entireties property and is no longer good law after *Popky*. In any event, as petitioner acknowledges (Pet. 15), a conflict among the district courts and bankruptcy courts does not provide an appropriate basis for review by this Court.

46.793% and the non-debtor spouse's interest at 53.207%. *Id.* at 1116. The government did not contest the court's reliance on those tables. The debtor appealed, however, arguing that his interest should be valued using single-life expectancy tables. *Id.* at 1117-1118. In rejecting that argument, the Ninth Circuit noted that such an approach would result in the spouses' combined interests totaling more than 100%, and it held that the sum of the spouses' concurrent interests in entireties property "must equal 100% of the value of the Property." *Id.* at 1118.[5]

Harris v. *United States*, 764 F.2d 1126 (5th Cir. 1985), and *United States* v. *Molina*, 764 F.2d 1132 (5th Cir. 1985), involved homestead properties in Texas that were encumbered by a lien for the federal tax indebtedness of one spouse. In those cases, the Fifth Circuit held that the spouses' concurrent ownership of the homestead required the use of joint-life, rather than single-life, tables to value their respective shares. *Id.* at 1131, 1133. Because neither the Fifth Circuit in those cases nor the Ninth Circuit in *Pletz* was asked to decide whether a 50-50 division of entireties property was appropriate, the court of appeals' decision in this case does not conflict with those rulings.

The decision in *United States* v. *Gibbons*, 71 F.3d 1496 (10th Cir. 1995), is further afield. In *Gibbons*, a

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[5] Petitioner argued in the court of appeals that her interest in the entireties property exceeded 93%, and that it was of no import that, under her valuation method, the combined interests owned by petitioner and taxpayer would exceed 100%. See Pet. C.A. Br. 36-37. The Sixth Circuit rejected petitioner's argument (Pet. App. 10a) under reasoning similar to that in *Pletz*, explaining that the sum of the two spouses' interests could not exceed the whole of the property to be distributed upon foreclosure.

separation agreement severed a joint tenancy (not a tenancy by the entirety), and under the agreement the spouse who was liable for the federal taxes no longer had a life estate in the property. *Id.* at 1500. The Tenth Circuit held only that, because the separation agreement conveyed ownership of both the sole life estate and a one-half remainder interest to the non-liable spouse, "she ha[d] more than a one-half interest in the property." *Ibid.* *Gibbons* is not inconsistent with the decision of the court of appeals here.

Finally, in *United States* v. *Baran*, 996 F.2d 25 (2d Cir. 1993), the Second Circuit held that an individual life estate encumbered by a federal tax lien is valued by reference to actuarial tables. *Id.* at 28. That holding simply gives effect to the fact that the entire value of the property in which the life estate is held must be reduced by the value of the remainder interest. Nothing in *Baran* supports petitioner's view that resort must be made to actuarial tables in every case to determine the value of the non-liable spouse's interest in entireties property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011

APPENDIX

1. 26 U.S.C. 6321 provides:

Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. 7403 provides:

Action to enforce lien or to subject property to payment of tax

(a) Filing

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.